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ROSALIE EDWARDS V. AARON MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006
December 8, 1983

ROSALIE EDWARDS

v. Docket No. WEST 80-441-DM

AARON MINING, INC.

DECISION

This discrimination case arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq. (1976 & Supp. V 1981). At issue is whether the failure to provide more suitable toilet facilities at the mine site, which failure led to the miner's resignation, constituted retaliatory action in response to repeated requests and complaints by the miner concerning existing facilities. The administrative law judge concluded that the operator had constructively discharged the miner in violation of the Mine Act. *Rosalie Edwards v. Aaron Mining, Inc.*, 3 FMSHRC 2630 (November 1981) (ALJ). On review, the operator challenges the judge's finding of discrimination. For the reasons that follow, we reverse.

The facts are largely undisputed. The complaining miner, Rosalie Edwards, worked at Aaron Mining, Inc., as an assayer of gold samples from January 21, 1980 through about March 15, 1980. At the time that she accepted employment with Aaron there were no indoor or permanent toilet facilities on the mine site. Edwards had not inquired about such facilities when she was hired, but during her tenure she requested toilet facilities in every daily safety report she submitted, as well as in conversations with Aaron supervisory personnel.

The only toilet facility on the mine site was an outhouse

located about three-quarters of a mile from the lab in which Edwards worked. (Aaron had attempted to drill for water for permanent facilities, but its repeated efforts in this regard had been unsuccessful.) In order to reach the outhouse an employee of Aaron had to travel a single-lane road on which visibility was poor. The employee then had to climb under a barbed-wired fence and walk about a half a block down a hill to reach the outhouse. Edwards described the sanitary conditions in the outhouse as appalling and used the facility only once. In response to her complaints, Edwards testified that Aaron stated that it would install a suitable restroom soon. The lack of water in the area, however, presented obvious problems.

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After working at the mine for four weeks Edwards claimed to have developed a bladder infection, although no medical substantiation of this claim was provided. This apparently was linked to her determination not to use the outhouse on the mine site, but instead to wait from 6:30 a.m. to 4:00 p.m. to use a toilet. She was out of work for a week claiming this was due to the asserted infection. When she returned, she began to drive to her home and back once during each work day (a 20-mile and 70-minute round trip) to use the bathroom there. Aaron knew of the trips, did not object to her going, did not dock her pay for the time lost and, on two occasions, gave her gasoline for her car. After making this round trip for several weeks, Edwards told Aaron supervisory personnel that it was "very inconvenient" to go home daily.

Edwards' last working day was Friday, March 15, 1980. On either March 16 or 17, 1980, Edwards resigned. She did so by going to the home of Aaron's general manager, where she complained once more about the lack of permanent or indoor toilets. She also gave him a letter stating that she was willing to return when Aaron had a water supply for permanent toilet facilities, and if Aaron increased her salary. The general manager offered to meet her salary demand, but Edwards refused to stay. 1/

On April 7, 1980, Edwards wrote to the Department of Labor's Mine Safety and Health Administration (MSHA) alleging discrimination under the Mine Act because of Aaron's failure to provide suitable toilet facilities. The Secretary of Labor investigated her complaint, found no violation of the Act, and declined to proceed on her behalf. On August 21, 1980, pursuant to section 105(c)(3) of the Mine Act, Edwards filed a complaint of discrimination with this independent Commission. 30 U.S.C. 815(c)(3).

After the hearing, the Commission's administrative law judge concluded that Edwards' complaints about the lack of required sanitary facilities were protected activity, and that Edwards was constructively discharged by the operator while engaging in that activity. He based his conclusion of constructive discharge on a finding that Edwards' only reasonable alternative to working under unsafe and unhealthful conditions was to quit. In his view, her resignation under these facts was equivalent to being discharged. 3 FMSHRC at 2633. We granted the operator's petition for discretionary review of the judge's decision.

Under the Mine Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he

or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *William A. Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1936-37 (November 1982); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*. 663 F.2d

1/ Sometime in March 1980, Edwards filed a claim for unemployment compensation with the State of Nevada. Aaron evidently claimed there was a toilet facility (the outhouse) in Edwards' work area. Although the State originally denied Edwards' claim, it awarded her benefits on appeal. The appeals referee found that Edwards left work voluntarily but with good cause, because Aaron failed to provide toilet facilities as required by federal regulation.

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1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. Haro 4 FMSHRC at 1937; Robinette, 3 FMSHRC at 818, n. 20.

We first consider whether Edwards engaged in protected activity. The undisputed evidence shows that Edwards complained repeatedly, both orally and in writing, about what she reasonably believed were unhealthful conditions. The operator concedes that "restroom facilities at Aaron Mining were less than adequate." Therefore, we affirm the judge's conclusion that Edwards' complaints were protected and conclude that she established the first element of a prima facie case of discrimination.

We further conclude, however, that Edwards failed to establish the second element of a prima facie case, i.e. she did not show that there was adverse action by the operator motivated in any part by her safety complaints. Aaron did not take any retaliatory action. The operator did not fire, demote, transfer, or harass her. Even if Aaron's failure to provide the requested toilet facilities is viewed as an adverse action, we find no evidence that this failure was motivated in any way by Edwards' protected complaints. As we noted earlier, there were no permanent toilets when Edwards was hired. According to the substantial and uncontroverted evidence of record, Aaron unsuccessfully tried to drill for water for permanent facilities and to obtain portable facilities. Further, Aaron accommodated Edwards by permitting her to leave the mine site daily for extended periods to travel to her house and, on two occasions, replaced gasoline consumed on those trips. There is no indication that Aaron tried to force Edwards to quit. To the contrary, the operator tried to persuade her to remain by offering to meet her demand for a salary increase. In our view, the record does not establish that Aaron's failure to remedy the condition complained of by Edwards was motivated in any part by Edwards' protected activity. Thus, under Mine Act discrimination analysis, the judge's finding of a violation cannot be upheld. 2/

Application of the principles of "constructive discharge does not change the result. For the reasons just stated we find no evidence that Aaron created or maintained the existing toilet facilities because of the exercise by Edwards of any rights protected by the Mine Act. No proof of an impermissible motive having been shown, a constructive discharge in violation of the Act is not

established. Cf NLRB v. Haberman Constr. Co., 641 F.2d 351, 358 (5th Cir. 1981)(en banc). Accord Cartwright Hardware v. NLRB, 600 F.2d 268, 270-71 (10th Cir. 1979); J.P. Stevens and Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972); Montgomery Ward v. NLRB, 377 F.2d 452, 458-459 (6th Cir. 1967); see BNA 2 e Developing Labor Law 210-11 (2d ed. 1983). Thus, we hold that Aaron's failure to provide toilet facilities, and Edwards' resulting quit, do not constitute discrimination in violation of section 105(c).

2/ It is important to note that the issue in this case is not whether Aaron violated any mandatory standard by its failure to provide adequate toilet facilities. Rather, the question we address is whether that failure constituted discrimination under section 105(d) of the time Act.

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We note that Edwards was not without a statutory remedy in the situation she faced. Section 103(g)(1) of the Mine Act affords a miner the right to obtain an immediate inspection by the Secretary of Labor's Mine Safety and Health Administration when the miner has reasonable grounds to believe that a violation of the Mine Act or of a mandatory health or safety standard exists. 30 U.S.C.

813(g)(1). The record in this case suggests reasonable ground for Edwards to believe that a violation of 30 C.F.R. 56.20-8, a mandatory health standard, existed. 3/ Thus, through the procedure available under section 103(g)(1), Edwards could have obtained an MSHA inspection of Aaron's toilet facilities. Had the Secretary's representative found those facilities to be in violation, he could have utilized the full array of available statutory enforcement powers, including the issuance of citations and withdrawal orders and the proposed assessment of penalties. Here, Edwards did not set this statutory scheme in motion, but rather took the personal recourse of resigning her job. 4/

Accordingly, we reverse the judge's finding of discrimination, vacate his award of back pay, interest, and incidental expenses, and vacate his assessment of penalty.

Rosemary M. Collyer, Chairman

Richard V. Backley,

Commissioner

A. E. Lawson, Commissioner

3/ 30 C.F.R. 56.20-8 provides:

Mandatory. Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel. The facilities shall be kept clean and sanitary. Separate toilet facilities shall be provided for each sex where toilet rooms will be occupied by no more than one person at a time and can be locked from the inside.

4/ Edwards testified that at the time of her resignation, she was not aware of the relevant mandatory standard, 30 C.F.R. 56.20-8. However, there is no indication that she was unaware of MSHA's responsibility for inspecting mines. Indeed, she was sufficiently

aware of MSHA's responsibilities. to contact that agency about the alleged discrimination two weeks after her resignation.

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Commissioner Jestrab, specially concurring:

I concur in the result reached in the decision of my esteemed colleagues reversing the order of the Administrative Law Judge. In my opinion, however, the holding here does not change the Commission's rule on work refusal. *Pratt v. River Hurricane Coal Company*, 5 FMSHRC 1529, 1533 (September 29, 1983) and cases cited therein.

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Commissioner Nelson. concurring:

I agree with the majority's analysis of this case and I concur in its holding that Rosalie Edwards was not discharged, or in any way discriminated against, in violation of section 105(c) of the Mine Act. 30 U.S.C. 815(c). Nevertheless, I believe that under the facts of this case the majority opinion may be read by some as arriving at an overly harsh result. In my view, such a reading would be incorrect. Certainly the factual recitation elicits considerable sympathy for Rosalie Edwards; in any event the Commission must decide cases on the bases of the law and the facts -- not on the basis of sympathy or empathy. Were it otherwise, the result in this case with good reason might be different. Thus, despite the absence of adequate toilet facilities at the mine (prior to and during the tenure of Rosalie Edwards), a case of unlawful discrimination was not established here and under the statute the operator must prevail.

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